International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 378 *and* International Longshore and Warehouse Union, Local 10 *and* International Union of Operating Engineers, Local 3 *and* American Bridge/Fluor Enterprises, Inc. Cases 32–CD–167, 32–CD–168, and 32–CD–169

May 21, 2009

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). American Bridge/Fluor Enterprises, Inc., a Joint Venture (the Employer) filed a charge on January 26, 2009,[1] alleging that the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 378 (Iron Workers) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by the Iron Workers rather than to employees represented by the International Longshore and Warehouse Union, Local 10 (ILWU). The Employer filed a second charge on January 26, alleging this time that the ILWU violated Section 8(b)(4)(D) by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by the ILWU rather than to employees represented by the Iron Workers.[2] A hearing was held in this matter on Monday, March 2, before Hearing Officer Cynthia Rence. Thereafter, the Employer and the Iron Workers filed posthearing briefs.

The National Labor Relations Board[3] affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer is a general contractor engaged in the construction industry and that, during the 12-month period prior to the hearing, it purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of California. We therefore find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties further stipulated that the Iron Workers and the ILWU are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer is a joint venture between American Bridge, a construction company, and Fluor Enterprises, Inc., an engineering procurement project management company. The Employer has a contract with the California Department of Transportation (Caltrans) for the construction of a new self-anchored suspension span bridge on the San Francisco-Oakland Bay Bridge. Caltrans obtained an easement to use Pier 7 at the Port of Oakland to receive material required for the project. A dispute has arisen as to whether certain work associated with offloading of ships and vessels arriving at Pier 7 for the purpose of providing materials for the Bay Bridge project should be assigned to employees represented by the Iron Workers or the ILWU.

Over the course of the Bay Bridge project, approximately 11 shipments of structural steel are to be shipped to Pier 7 from China. Unloading these shipments will involve securing the ships to Pier 7, unloading the steel materials from the pier, prepping the steel structures to be transported to a barge via crane, transporting the steel structures via crane, unloading the steel structures from the crane to a barge, and then prepping the steel structures so that they can be hoisted from the barge to the steel structure's predesignated location.

The first shipment of structural steel arrived at Pier 7 on December 26, 2008. The line handling for the berthing of the ship at Pier 7 was done by a crew of Iron Workers employed by the Employer. Within about 20 minutes of the arrival of the ship, Captain Morrell of the California Highway Patrol (CHP) notified Brian Peter-

[1] All dates hereafter are in 2009, unless otherwise stated.

[2] The Employer also filed a third charge, alleging that the ILWU violated Sec. 8(b)(4)(D) by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by the ILWU rather than to employees represented by the International Union of Operating Engineers, Local 3 (IUOE). At the 10(k) hearing, however, the ILWU disclaimed interest in the work at issue in the third charge. This charge has since been dismissed.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *New Process Steel, L.P. v. NLRB*, ___ F.3d ___, 2009 WL 1162556 (7th Cir. May 1, 2009); *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), pet. for rehearing denied (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, ___ F.3d ___, 2009 WL 1162574 (D.C. Cir. May 1, 2009).

sen, the Employer's operations manager, that ILWU President Melvin Mackay wanted to speak with Petersen. Petersen testified that Mackay told him that the work of offloading the ship was the responsibility of the ILWU. Petersen told Mackay that the work had been assigned to the Iron Workers. Mackay then appeared to be talking on a cellular phone, and Petersen overheard Mackay say "shut the port down."

Later that same day, at about 6:30 p.m., Captain Morrell informed Petersen that the CHP could not confirm that the Employer's employees would have safe access to Pier 7 to unload the ship. Captain Morrell, other CHP officers, and members of the Oakland Police Department then cleared a path for Petersen and 19 other vehicles transporting the Employer's employees to leave Pier 7. As he was driving away from Pier 7, Petersen observed approximately 200 people on either side of the road leading to it. Many of the people Petersen observed were carrying picket signs which read, "ILWU Work, No Scabs." Some of the picketers were swearing and saying that there was "no way" the Iron Workers would get this work.

No unloading of the ship took place on December 27 or 28, 2008. On December 29, 2008, a mediation was held to try to reach a settlement with Caltrans that would allow for the unloading of the ship that arrived on December 26, 2008. After an agreement was reached, the ship was taken to a general anchorage point in the Bay on January 1, 2009. Employees represented by the Iron Workers and the IUOE offloaded the ship from January 1 through January 5. The mediation settlement agreement did not address how future ships arriving at Pier 7 would be unloaded.

On January 21, the president of the Iron Workers, Robert Lux, and the Iron Worker's business manager, Emilio Rivera, faxed a letter to the Employer stating: "Iron Workers Local 378 will take economic action if any of our work associated with unloading ships or barges of material for the new Bay Bridge is assigned to the ILWU or any other union. This work includes any of the rigging and signaling associated with the unloading of those ships or barges which are scheduled to come into the San Francisco Bay and unload material for the next several years." The Employer then filed the first of the instant unfair labor practice charges, on January 26.

On February 18, the Board's Region 32 filed a petition under Section 10(l) of the Act in the U.S. District Court for the Northern District of California seeking an injunction against the ILWU; the Court granted the injunction on March 9.

B. Work in Dispute

The parties stipulated that the following work is in dispute:

> The line handling, signaling, and rigging, associated with offloading, of ships and vessels arriving at Pier 7 in Oakland, California, with structural steel supports and other construction materials for the Bay Bridge Project.

C. Contentions of the Parties

The Employer stipulates that this 10(k) dispute is properly before the Board for determination. On the merits of the dispute, the Employer asserts that the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operations all favor awarding the disputed work to its employees represented by the Iron Workers.

The Iron Workers also stipulate that this jurisdictional dispute is properly before the Board for determination. On the merits of the dispute, the Iron Workers contend that the work in dispute should be awarded to the employees it represents based on the factors of relative skills and training, employer preference, area practice, past practice, and economy and efficiency of operations.

At the hearing in this matter, the ILWU took the position that the work in dispute should be awarded to the employees it represents. The ILWU did not file a post-hearing brief, nor did it present any relevant evidence in support of its position at the hearing.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(ii)(D) has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims for the disputed work and that a party has used proscribed means to enforce its claim to the work in dispute. Additionally, there must be a finding that the parties have not agreed on a method for voluntary adjustment of the dispute. See, e.g., *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). We find that these requirements have been met.

1. Competing claims for work

We find that there are competing claims for work. The Iron Workers have at all times claimed the work in dispute for the employees it represents, and these employees have expected to and were prepared to perform this work upon the first shipment's arrival at Pier 7, on December 26, 2008. The ILWU claimed a certain portion of the

work the Iron Workers expected to perform when ILWU President Melvin Mackay informed Employer Project Manager Brian Petersen that the ILWU claimed the work of offloading the ships docking at Pier 7 with supplies for the Bay Bridge project, and by the presence of picketers on the project site bearing signs in support of assignment of the work to the ILWU.

2. Use of proscribed means

There is also reasonable cause to believe that Section 8(b)(4)(ii)(D) has been violated. It is well established that a threat of picketing constitutes proscribed means. See *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004). Here, the ILWU threatened to "shut the port down," and began picketing the worksite on the day the work in dispute began. The ongoing picketing led to the shutdown of the project on December 26–29, 2008. Further, the Iron Workers threatened economic action "if any of our work associated with unloading ships or barges of material for the new Bay Bridge is assigned to the ILWU or any other union" via a letter faxed to the Employer on January 21. No allegations have been made that the economic action threat of the Iron Workers was contrived.

3. No voluntary method for adjustment of dispute

Although the Employer and the ILWU negotiated a one-time resolution, we find there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

Based on the foregoing, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k). Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination in this dispute.

1. Certification and collective-bargaining agreements

There is no evidence of Board certifications concerning the employees involved in this dispute.

The Employer does not have a collective-bargaining agreement with the ILWU. The Employer entered into a project labor agreement with several unions, including the Iron Workers, for the Bay Bridge project; this project labor agreement, in turn, incorporates the Caltrans master agreement with the Iron Workers. The master agreement includes the following description of work to be performed by employees represented by Iron Workers: "All work in connection with field fabrication and/or erection or deconstruction of structural, ornamental, and reinforcing steel, including . . . loading, unloading, hoisting, handling, signaling, placing and erection of all prestressed, poststressed, precast materials . . . [and] the unloading, loading, hoisting, handling and rigging of all building materials delivered to the job site."

The evidence establishes that the master agreement between Caltrans and the Iron Workers covers the work in dispute in this matter. The ILWU has offered no evidence that it is a party to a labor agreement with the Employer. Accordingly, we find that the project labor agreement and the master agreement favor an award of the work in dispute to employees represented by the Iron Workers.[4]

2. Employer preference and past practice

The Employer prefers to assign, and has assigned, the disputed work to employees represented by the Iron Workers. In the past, the Employer has used employees represented by the Iron Workers on other bridge construction projects. The Employer has never directly employed an ILWU member on any project. We find that these factors favor an award of the disputed work to the employees represented by the Iron Workers.

3. Area and industry practice

The Iron Workers presented evidence concerning the area and industry practices. One journeyman iron worker testified that he had performed rigging work on several bridge projects in the area, and that this rigging work had included rigging of large structural steel pieces for bridges. Another journeyman iron worker testified that he had performed rigging work, including the lifting of construction materials from barges, on two previous bridge projects in the area.

No testimony was provided at the hearing supporting the existence of an area or industry practice for employees represented by the ILWU to perform the work of line

[4] The Board has recognized that project labor agreements can be considered in evaluating whether this factor of the analysis favors assignment of the disputed work to employees represented by a particular union. See, e.g., *Carpenters Local 623 (E.P. Donnelly, Inc.)*, 351 NLRB 1417, 1420 (2007).

handling, signaling, and rigging for bridge projects in the area.

The evidence presented favors an award of the type of work in dispute to employees represented by the Iron Workers.

4. Relative skills

The Iron Workers presented evidence that its members possess the required skills, training, and experience to perform the disputed work. The ILWU presented no evidence that the employees it represents possess the required skills or training in the area of the disputed work. Accordingly, this factor weighs in favor of awarding the work to the employees represented by the Iron Workers.

5. Economy and efficiency of operations

The Employer's project manager testified that it is more efficient and economical to have employees represented by the Iron Workers perform the work in dispute. By assigning the work to Iron Workers-represented employees, the Employer is able to have the same workers perform the preparation work and rigging from both the ships and the barges. Not only does this increase cost efficiency, but it also increases the portability of the work force, the consistency of the work force, and the ease in providing and ensuring safety training to the work force.

The ILWU provided no evidence that awarding the work to employees it represents would increase the economy or efficiency of operations. Consequently, this factor favors an award of the disputed work to the employees represented by the Iron Workers.

Conclusion

After considering all the relevant factors, we conclude that employees represented by the Iron Workers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 378, not to that labor organization or its members. The determination is limited to the controversy that gave rise to this proceeding.

Determination of Dispute

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of American Bridge/Fluor Enterprises, Inc., a Joint Venture, represented by the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 378, are entitled to perform the line handling, signaling, and rigging, associated with offloading of ships and vessels arriving at Pier 7 in Oakland, California, with structural steel supports and other construction materials for the Bay Bridge project.

2. International Longshore and Warehouse Union, Local 10, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force American Bridge/Fluor Enterprises, Inc., a Joint Venture, to assign the disputed work to employees represented by it.

3. Within 14 days from this date, International Longshore and Warehouse Union, Local 10, shall notify the Regional Director for Region 32 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. May 21, 2009

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Wilma B. Liebman, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD